

No. 89-7370

Supreme Court, U.S.

FILED

JUL 24 1990

JOSEPH F. SPANGL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

MOSHE GOZLON-PERETZ,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

On Writ Of Certiorari To The United States  
Court Of Appeals For The Third Circuit

JOINT APPENDIX

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**Petition For Certiorari Filed April 25, 1990**  
**Certiorari Granted June 18, 1990**

59092

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RELEVANT DOCKET ENTRIES  
CRIMINAL DOCKET • U.S. District Court  
U.S.

vs.

DiSTEFANO, PASQUALE  
MOSHE GOZLON-PERETZ  
a/k/a "Pasquale DiStefano"

Case Filed 03-05-87

Docket No. 87-80-01

No. of Def.'s 3

Felony [X]

CHARGES:

U.S. Title/Section	Offenses Charged	Original Counts
21:846	Conspiracy to distr. and possess w/intent to distr. a substance con- taining heroin (Schedule I) (21:841(a)(1)) Ct. 1	1
21:841(a)(1) & 18:2	Possess w/intent to distr. a subs- tance containing heroin (Schedule I) Ct. 2	1
21:841(a)(1) & 18:2	Distribute a subsance containing heroin (Schedule I) Ct. 3	1

Date of Offense: 2-26-87

DISPOSITION DATE 5-21-87

SENTENCE DATE 8-14-87

DATE	Doc. No.	PROCEEDINGS
3-9-87	9.	INDICTMENT FILED 3-5-87
4-10-87		ELLUS YEHUDA - PLEA - NOT GUILTY ANNETTE AMAR - PLEA - NOT GUILTY PASQUALE DiSTEFANO - PLEA - NOT GUILTY Ordered Defendants held without bail and remanded to M.C.C. Ordered Trial date fixed for May 18, 1987
5-13-87	17.	ALL DEFENDANTS - SUPERSEDING INDICTMENT filed.
5-18-87	18.	MOSHE GOZLON-PERETZ and YAFFA LEVY - Minutes of 5/18/87. PLEAS TO SUPERSEDING INDICTMENT - NOT GUILTY TRIAL MOVED BEFORE THE COURT & JURY.
5-18-87	19.	ELLUS YEHUDA - Minutes of 5/18/87 filed. Defendant Sworn. PLEA TO SUPERSEDING INDICTMENT - COUNTS 1 & 2 - NOT GUILTY COUNT 3 - GUILTY Ordered remanded to M.C.C. without bail
5-21-87	25.	MOSHE GOZLON-PERETZ and YAFFA LEVY - VERDICT- MOSHE GOZLON-PERETZ - Count 1 - Guilty Count 2 - Guilty Count 3 - Guilty

		YAFFA LEVY - Count 1 - Guilty Count 2 - Guilty Count 3 - Guilty Ordered Verdict filed. Sentence Date - 7/10/87 - 10:30 AM
8-14-87	28.	ELLUS YEHUDA - Minutes of 8/14/87 filed. SENTENCE - On Superseding Indictment - Count 3 20 years impr. and a special parole term of 5 years, and pay a special assessment of \$50.00 Fine - \$200,000.00. The defendant to stand committed until said fine is paid or he is otherwise discharged by due course of law. On motion of government - Ordered Counts 1 & 2 of Superseding Indictment and Original Indictment dismissed.
8-17-87	30.	ELLUS YEHUDA - Judgment and Commitment/Probation Order filed 8/14/87. (Gerry) n/m
8-17-87	31.	YAFFA LEVY - Minutes of 8/14/87 filed 8/14/87. SENTENCE - On Superseding Indictment On Count 3 - 10 yrs. impr. and Special Parole term of 5 years, and pay special assessment of \$50.00 On Count 2 - impr. for 5 yrs. Special Parole term of 3 years, and pay a special assessment of \$50.00. On Count 1 - Impr. for 10 years and pay a special assessment of \$50.00 Further Ordered that the said sentences on Counts 1 & 2 are to run concurrently with each other and to sentence imposed on Count 3. In summary, total term of



- imprisonment is 10 years, plus 5 years of special parole and a total special assessment of \$150.00
- 8-17-87 33. YAFFA LEVY - Judgment and probation/Commitment Order filed 8/14/87. (Gerry) n/m
- 8-17-87 34. MOSHE GOZLON-PEREZ (sic) - Minutes of 8/14/87 filed 8/14/87. SENTENCE - On Superseding Indictment On Count 3 - 20 years impr. and a special parole term of 5 years, pay a Fine of \$200,000.00, and pay a special assessment of \$50.00, and that the defendant stand committed until the fine is paid or he is otherwise discharged by due course of law. On Count 2 - Imprisonment for 20 years, and a special parole term of 5 years, and pay a special assessment of \$50.00. On Count 1 - Impr. for 20 years and pay a special assessment of \$50.00. It is further Ordered that said sentences of imprisonment and special parole only on Counts 1 and 2 are to run concurrently with each other and to sentence imposed on Count 3. In Summary total term of imprisonment is 20 years, 5 years Special Parole Term Total Fine - \$200,000.00 Total special assessment - \$150.00
- 8-17-87 36. MOSHE GOZLON-PEREZ (sic) - Judgment and Probation/Commitment filed 8/14/87. (Gerry) n/m
- 8-21-87 37. YAFFA LEVY - Notice of appeal of defendant filed 8/21/87 at 2:30 P.M.

- 8-21-87 38. MOSHE GOZLON-PEREZ (sic) - Notice of appeal of defendant filed 8/21/87 at 2:30 P.M.
- 8-26-87 39. ELLUS YEHUDA - Notice of appeal of defendant filed 8/19/87
- 1-17-89 59. ALL DEFENDANTS - Opinion USCA filed.
- 2-2-89 63. MOSHE GOZLON-PERETZ - Certified copy of Judgment of USCA issued in lieu of a formal mandate on January 31, 1989 affirming the judgments of USDC entered August 17, 1987, in accordance with the opinion of the Court filed. (affirmed insofar as the conviction and vacated insofar as sentence and the case remanded to USDC for resentencing)
- 3-22-89 66. ELLUS YEHUDA - Withdrawal of guilty plea filed.
- 3-30-89 67. MOSHE GOZLON-PERETZ - Order appointing counsel, CJA (for resentencing) filed. (Gerry)
- 4-14-89 68. ELLUS YEHUDA - Minutes of 4/14/89 filed. Ordered sentence of 8/14/87 vacated. Original Plea of guilty withdrawn.
- 1-14-89 69. MOSHE GOZLON-PERETZ - Minutes of 4/14/89 filed. Ordered sentence of 8/14/87 vacated. RE-SENTENCE ON 3 COUNTS OF SUPERSEDING INDICTMENT COUNT 3 - 15 years, and 5 years Special Parole Term & fine - \$200,000.00 & special assessment of \$50.00

COUNT 2 - 15 years, and 5 years  
Special Parole Special assessment -  
\$50.00

COUNT 1 - 20 years and special  
assessment of \$50.00

Sentence on Count 1 and Count 2 to  
run concurrent with sentence  
imposed on Count 3 -

Total sentence - 20 years and fine of  
\$200,000.00 \$150.00 special assess-  
ment and 5 years special parole  
(Gerry)

4-19-89 72. MOSHE GOZLON-PERETZ - Notice  
of Appeal of defendant filed  
4/19/89 at 11:52 AM

4-21-89 74. MOSHE GOZLON-PERETZ -  
JUDGMENT filed 4/20/89 (Gerry)  
n/m (CERTIFIED COPY TO USCA)

5-26-89 MOSHE GOZLON-PERETZ -  
RECORD COMPLETE FOR PUR-  
POSES OF APPEAL (SENT TO  
USCA)

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
CLOSED

Case Closed JAN 31 1989

DOCKET No. 87-5596

Rehearing In Banc 11-7-88

Related Cases 87-5595; 87-5613

CALENDARED FOR: 6-15-88

ORIGIN: NJ - Camden

DC DOCKET NO. Criminal 87-00080-03

DC JUDGE John F. Gerry

FILED IN DC 3-5-87

NOA FILED 8-21-87

CASE TYPE CR - Consp. to distr. & poss. w/ intent to  
distr. a sub. contg. heroin

DOCKETED: 8-26-87

[X] Fee Paid [ ] IFP [X] CJA [ ] USA

TITLE OF CASE

APPEARANCES

UNITED STATES OF  
AMERICA

vs.

MOSHE GOZLON-  
PERETZ, a/k/a  
"Pasquale DiStefano",  
Appellant

APPELLANT/PETITIONER:

~~Charles F. Garnesi 10-19-87~~  
~~Charles F. Garnesi, Esq.~~  
~~186 Joralemon Street~~  
~~Brooklyn, NY 11201~~  
~~(718) 855-6646~~

~~[Appellant, Moshe Gozlon-  
Perez (sic)]~~

~~[CT. APTD. CRIM. 1-22-88]~~

WITHDRAWN - See 2-19-88  
Clerk Order  
NOW HAS RETAINED  
COUNSEL

"CONTD."

---

 APPELLEE/RESPONDENT:

Michael V. Gilberti, Esq.  
4-5-88  
Edna Ball Axelrod, Esq. -  
9-10-87  
Assistant U.S. Attorney  
U.S. Attorney's Office  
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Newark, NJ 07102  
(201) 621-2755/FTS 348-2755

## (CONTINUATION APPEARANCES):

## (APPELLANT)

Peter Goldberger, Esq. 2-10-88  
Pamela A. Wilk, Esq. - 6-15-88  
[215-923-1300]  
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Philadelphia, PA 19107  
[215-592-9400]

## SUMMARY OF EVENTS

\*ARGUED/SUBMITTED 6/15/88 - SEE PG. 2

PANEL Mansmann, Scirica & Cowen, C.J.

\*REARGUED IN BANC 11/7/88 - SEE PG. 3

OPINION 1/9/89 cv. 87-5595/6 & 5613

[ ] Mem. Op. [X] Signed [ ] P.C.N./P or Pub.

MO Stapleton CO \_\_\_ DO \_\_\_

JUDGMENT - Affirming in No. 87-5595. Affirming, etc.

Vacating & Remanding in 87-5596. Affirming, etc.

Vacating, etc & Remanding in No. 87-5613.

\*MANDATE ISSUED JAN 31 1989

Reported at 865 F2d 551

DATE	FILINGS - PROCEEDINGS
<u>1987</u>	
Nov. 30	Order in No. 87-5595 (Clerk) that the appeals docketed at Nos. 87-5595, 87-5596 & 87-5613 are consolidated for purpose of disposition & if the parties so choose for purposes of filing briefs & single jt apx; the briefing schedules entered in appeal Nos. 87-5595 & 87-5596 are vacated & a new briefing schedule covering all 3 appeals will be entered after the questions of representation in appeal Nos. 87-5595 & 87-5596 are resolved, filed. (11)
<u>1988</u>	
Feb. 19	Order (Clerk) granting above mot, appearance of Peter J. (sic) Goldberger, Esq., is substituted, filed. (adl)
June 15	At oral argmt. cnsl. for appee. to file supp. letter within 24 hrs. re: appendix citation to Gozlon-Perez (sic) and a red bag. (87-5595/96) (ab)
June 16	Letter dated 6-15-88 from aplee rec'd. at direction of Ct. (adl) (Cvs 5595/6, 5613)
June 16	Letter dated 6-16-88 from aplt in 87-5596 rec'd. at direction of Ct. (adl) (Cvs 5595/6, 5613)
Jul 28	Order Seitz, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica and Cowen, CJS)



Granting Rehearing before the Court in banc. The Clerk shall list the case for rehearing before the court in banc at the convenience of the Court, filed. Cvs. 87-5595, 87-5596 & 87-5613.

- Sept. 15 Order (Seitz, J.) granting Motion of Applt. for leave to file supp. briefs; Counsel will be advised by letter as to matters Court wishes to have addressed, filed. (mef) (No. 87-5596).
- Sept. 15 Clerk's letter to counsel directing counsel to file supp. briefs by addressing certain issues raised by Court and Appls' briefs to be filed on or before Sept. 29, 1988; Government's brief on or before Oct. 14, 1988; Counsel will be granted 20 minutes for oral argument. (Covers 87-5595/6) (mef)
- Oct. 31 Order (Seitz, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica and Cowen, C.J.) granting aplt's motion for leave to file reply to supplemental brief for aplee, filed. (11)

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
CLOSED

Case Closed FEB 16 1990  
DOCKET No. 89-5330  
CALENDARED FOR: 10-17-89

ORIGIN: NEW JERSEY (Camden)  
DC DOCKET NO. Criminal 87-00080-03  
DC JUDGE John F. Gerry  
FILED IN DC 3-5-87

NOA FILED 4-20-89  
CASE TYPE Criminal - Code P

DOCKETED: 4-27-89  
[ ] Fee Paid [ ] IFP [X] CJA [ ] USA

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TITLE OF CASE	APPEARANCES
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UNITED STATES OF AMERICA  vs.  MOSHE GOZLON-PERETZ,  <div style="text-align: right;">Appellant</div>	APPELLANT/ PETITIONER:  XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXX  [Ct.-Aptd.-Criminal-4/27/89]  <div style="text-align: right;">OVER-</div>
APPELLEE/ RESPONDENT:  Michael V. Gilberti, Esq. - 7-27-89 Edna Ball Axelrod, Esq. - 5-4-89 Chief, Appeals Division U.S. Attorney's Office 970 Broad Street, Room 502 Newark, NJ 07102 (201) 621-2755/FTS 348-2755 (201) 621-2737 (Gilberti)	

SUMMARY OF EVENTS

~~ARGUED~~/SUBMITTED 10/17/89  
 PANEL Becker, Cowen & Seitz, CJ  
 OPINION 1/25/90  
 [ ] Mem. Op. [X] Signed [ ] P.C. N./P or Pub.



MO Becker (ch) CO \_\_\_ DO \_\_\_

JUDGMENT vacating insofar as the jdmt of sentence & the cause remanded to D.C. w/direction to impose a term of supervised release in lieu of a term of special parole. Further ordered that the judgment is affirmed in all other respects.

MANDATE ISSUED FEB 16 1990

DATE	FILINGS - PROCEEDINGS
<u>1989</u>	
July 3	Letter dtd 7-3-89 from aplt rec'd for info of Ct. (dr)
Aug. 21	Letter dtd 8-14-89 from aplee rec'd for info of Ct. (dr)
Aug. 28	Order ( <i>Becker</i> , Cown (sic) & Sietz (sic), C.j.) granting motion by aplt for leave to file supplemental brief, filed. (dr)
Sept. 28	Clk's ltr to cnsl directing them to submit ltr mem in quad no later than Oct. 10, 1989 as to whether they intend to adhere to certain provisions (sic) of the Anti-Drug Abuse Act of 1986 (af) (Cvs. 89-3461 & 89-5330)
Oct. 10	Letter dtd 10-5-89 from aplee in 89-3461 rec'd at dir. of Ct. (dr) (Cvs. 89-3461 & 89-533)
Oct. 10	Letter dtd 10-6-89 from aplee in 89-5330 rec'd at dir. of Ct. (dr) (Cvs. 89-3461 & 89-5330)
<u>1990</u>	
Feb. 6	Order ( <i>Becker</i> , Cowen & Seitz, CJS) Amending the slip opinion, filed. (ch)

Apr 10 Order (*Becker*, CJ) granting motion by Pamela A. Wilk, court-appointed counsel, for leave to withdraw, and for substitution by Peter Goldberger as new counsel, filed (dh)

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Hon. John F. Gerry
	:	
v.	:	Crim. No. 87-80
	:	
MOSHE GOZLON-PERETZ	:	[Superseding Indictment]
a/k/a "Pasquale DiStefano," and	:	
YAFFA LEVY a/k/a "Annette Amar"	:	21 U.S.C. §§ 846 and 841(a)(1), and 18 U.S.C. § 2

The Grand Jury in and for the District of New Jersey charges that:

COUNT 1

1. From at least in or about February, 1986 until on or about February 26, 1987, at Atlantic City in the District of New Jersey and elsewhere, the defendants

MOSHE GOZLON-PERETZ  
a/k/a "Pasquale DiStefano," and  
YAFFA LEVY a/k/a "Annette Amar"

did knowingly and intentionally confederate, conspire, combine and agree among themselves and with others, known and unknown to the Grand Jury, to distribute and to possess with intent to distribute more than a kilogram of heroin, a Schedule I narcotic drug controlled substance, contrary to the provisions of Title 21, United States Code, Section 841(a) (1) (as amended October 27, 1986).

2. It was a part of the conspiracy that the defendants and others would obtain quantities of heroin ranging from 240 grams to at least 2 kilograms for resale.

3. It was also a part of the conspiracy that the defendants and others would find customers for the heroin and would sell it.

4. It was also a part of the conspiracy that the defendants and others would use communications facilities, such as public pay telephones and digital beepers to run their operation and to conceal their dealings.

5. It was also a part of the conspiracy that the defendants and others would use false names and documentation, such as passports to conceal their identities.

In violation of Title 21, United States Code, Section 846.

COUNT 2

On or about February 26, 1987, at Atlantic City in the District of New Jersey and elsewhere, the defendants

MOSHE GOZLON-PERETZ  
a/k/a "Pasquale DiStefano," and  
YAFFA LEVY a/k/a "Annette Amar"

did knowingly and intentionally distribute at least 240 grams of heroin, a Schedule I narcotic drug controlled substance.

In violation of Title 21, United States Code, Section 841(a) (1) (as amended October 27, 1986), and Title 18, United States Code, Section 2.

COUNT 3

On or about February 26, 1987, at Atlantic City in the District of New Jersey and elsewhere, the defendants

MOSHE GOZLON-PERETZ  
a/k/a "Pasquala DiStefano," and  
YAFFA LEVY a/k/a "Annette Amar"

did knowingly and intentionally possess with intent to distribute approximately two kilograms of heroin, a Schedule I narcotic drug controlled substance.

In violation of Title 21, United States Code, Section 841(a) (1) (as amended October 27, 1986), and Title 18, United States Code, Section 2.

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FOREPERSON

---

SAMUEL A. ALITO, JR.  
United States Attorney

---

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF	:	
AMERICA	:	CRIMINAL 87-00080 (03)
	:	
vs	:	JUDGMENT
MOSHE GOZLON-PERETZ	:	
	:	ORIGINAL FILED APR
	:	ILLEGIBLE 1989
	:	ILLEGIBLE

The Defendant having been convicted of the offenses of Conspiracy to distribute and possess with intent to distribute Heroin (Schedule I), of distributing Heroin (Schedule I), and of possessing with intent to distribute Heroin (Schedule I); and

It having been Ordered on August 14, 1987, that on Count 3, that the defendant be imprisoned for a period of 20 years, and a special parole term of 5 years, and pay a Fine of \$200,000.00, and pay a Special assessment of \$50.00, and that the defendant stand committed until the fine is paid or he is otherwise discharged by due course of law; and on Count 2, the defendant be imprisoned for a period of 20 years, and special parole term of 5 years, and pay a special assessment of \$50.00; and on Count 1, the defendant be imprisoned for a period of 20 years and pay a special assessment of \$50.00, and that said sentences of imprisonment and special parole only on Counts 1 and 2 are to run concurrently with each other and to sentence imposed on Count 3, and the total term of imprisonment is 20 years, with 5 years of special parole term, and pay a total fine of \$200,000.00 and pay a total special assessment of \$150.00;



It Is, on this 14th day of April, 1989,

ORDERED that the Judgment and Commitment imposed on August 14, 1987, is hereby Vacated; and it is hereby ORDERED that on Count 3 that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of Fifteen (15) Years, plus Five (5) Years Special Parole, and that he pay a Fine of \$200,000.00 and pay a special assessment of \$50.00; and On Count 2 that the defendant is hereby committed for imprisonment for a period of Fifteen (15) Years, plus Five (5) Years of Special Parole and that he pay a special assessment of \$50.00; and that on Count 1 that the defendant is hereby committed for imprisonment for a period of Twenty (20) years, and pay a special assessment of \$50.00; and that said sentences of imprisonment and special parole only on Counts 1 and 2 are to run concurrently with each other and to that imposed on Count 3. In summary, total term of imprisonment is Twenty (20) Years, plus Five (5) Years Special Parole, Total Fine is \$200,000.00, and Total Assessment is \$150.00.

IT IS FURTHER ORDERED that the Clerk deliver two certified copies of this JUDGMENT AND COMMITMENT to the United States Marshal or any other qualified officer and that a copy serve as the commitment of the defendant.

/s/ John F. Gerry  
JOHN F. GERRY,  
CHIEF JUDGE, U. S. D.

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United States Court of Appeals,  
Third Circuit.

UNITED STATES of America

v.

Yaffa LEVY, a/k/a "Annette Amar",  
Appellant in No. 87-5595,

UNITED STATES of America,

v.

Moshe GOZLON-PERETZ, a/k/a  
"Pasquale DiStefano", Appellant  
in No. 87-5596,

UNITED STATES of America,

v.

YEHUDA, Ellus, a/k/a "Holly Berthold"  
Appellant in No. 87-5613.

Nos. 87-5595, 87-5596 and 87-5613.

Argued June 15, 1988.

Nos. 87-5595 and 87-5596

Reargued En Banc Nov. 7, 1988.

No. 87-5613 Submitted Pursuant to  
Third Circuit Rule 12(6) Nov. 7, 1988.

Decided Jan. 9, 1989.

Argued June 15, 1988

Before MANSMANN, SCIRICA, and COWEN, Cir-  
cuit Judges.

Reargued En Banc Nov. 7, 1988

Before SEITZ, HIGGINBOTHAM, SLOVITER,  
BECKER, STAPLETON, MANSMANN, GREENBERG,  
HUTCHINSON, SCIRICA and COWEN, Circuit Judges.



# OPINION OF THE COURT

STAPLETON, Circuit Judge:

## I.

Appellants Yaffa Levy and Moshe Gozlon-Peretz were convicted by a jury in the United States District Court for the District of New Jersey on three counts. Count One of the Superseding Indictment charged participation in a conspiracy to distribute more than a kilogram of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982). Count Two charged distribution of approximately 240 grams of heroin, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (1982). Count Three charged possession with intent to distribute in excess of one kilogram of heroin, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Prior to the trial, appellant Ellus Yehuda, a co-defendant, pleaded guilty to possession with intent to distribute two kilograms of heroin.

At trial, the government relied primarily upon the testimony of Special Agent Paul Maloney, an undercover DEA agent, to convict defendants Levy and Gozlon-Peretz of, *inter alia*, conspiracy to distribute heroin on or about February 26, 1987. While Maloney was on the stand, the government elicited testimony concerning out of court statements made by Yehuda during the negotiations leading to the sale of the heroin to Maloney. The government tendered much of that testimony as probative of the truth of the assertions made by Yehuda. After Levy and Gozlon-Peretz objected to the admissibility of this evidence on hearsay grounds, the government urged that it was admissible under Federal Rule of Evidence

801(d)(2)(E) as statements made "by a coconspirator of a party during the course and in furtherance of the conspiracy." The district court applied the then governing circuit precedent, *United States v. Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983), and admitted the tendered evidence. Its action was premised on a finding pursuant to the *Ammar* standard that the record evidence, without reference to the purported co-conspirator statements, made it more likely than not that those statements were made in furtherance of a then existing conspiracy of which the defendants were members. Yehuda was available to testify at the trial but neither side chose to call him to the stand.

After the defendants were sentenced and while their appeals were pending before this court, the Supreme Court of the United States decided *United States v. Bourjaily*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). In that case, the Court disapproved the test articulated in *Ammar*, holding that a trial judge may consider all evidence, including the tendered out of court statements of the alleged co-conspirator, in deciding whether to admit the statements.

Several issues are raised in this appeal from the defendants' convictions: 1) whether there was sufficient independent evidence under this court's decision in *Ammar* to warrant the admission under Rule 801(d)(2)(E) of the out of court statements made by alleged co-conspirator Yehuda; 2) whether the false passports of the defendants and their use of false names were properly admitted into evidence; 3) whether, assuming the admissibility of the co-conspirator statements and the evidence regarding false identification, there was enough evidence

to support Levy's and Gozlon-Peretz's convictions; 4) whether retroactive application of *Bourjaily* to this case would violate notions of fundamental fairness inherent in the Due Process Clause of the Fifth Amendment; 5) whether, assuming *Bourjaily* is to be applied retroactively, there was sufficient evidence to permit the admission of the co-conspirator statements; 6) whether there is an unacceptable risk that the sentences imposed on Gozlon-Peretz and Yehuda were influenced by a misunderstanding on the part of the sentencing judge regarding the parole provisions of the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, §§ 1002, 1003, 100 Stat. 3207-2 (codified at 21 U.S.C. § 841(b)(1) (Supp. IV 1986)); and 7) whether the district court erred in failing to make factual findings regarding Yehuda's ability to pay the \$200,000 fine imposed upon him.

In keeping with the preferred practice of avoiding unnecessary decisions of constitutional issues, we first address the issue of whether the district court properly applied the *Ammar* standard when it admitted Yehuda's out of court statements. Because we hold that there was enough independent evidence to warrant the admission of these statements under *Ammar*, we do not reach the issue of whether *Bourjaily* could be applied here without violating due process. We also hold that the false passports and use of false identities were admissible, and that there was sufficient evidence to support Levy's and Gozlon-Peretz's convictions. We will vacate the sentences of Gozlon-Peretz and Yehuda, however, and remand for resentencing.

## II.

In March, 1986, a government informant introduced Special Agent Paul Maloney of the Drug Enforcement Agency to Yehuda. For the next eleven months, Maloney, acting in an undercover role, negotiated with Yehuda in an attempt to purchase large quantities of heroin. During these eleven months Maloney had approximately fifteen to sixteen telephone conversations and half a dozen "face-to-face" meetings with Yehuda. At each of the approximately six "face to face" meetings, Yehuda and Maloney tried to negotiate a heroin transaction. None of these transactions were ever consummated; the main sticking points were Yehuda's demand that Maloney give him money "up front" before delivery of the heroin, and Yehuda's apparent inability to obtain and produce any heroin despite his repeated promises. During these negotiations Yehuda stated that he had one source of heroin in Chicago and two in Thailand.

On February 24, 1987, Yehuda called Maloney at his Atlantic City office and said that "he had something" for Maloney. They agreed to meet the next afternoon at the Pennsylvania railroad station in Newark, New Jersey. They met as arranged. During the meeting Yehuda reported that he had met "a friend" in New York whom he had previously seen in Thailand and that his friend had entered the United States with about five kilograms of heroin. Yehuda then gave Maloney a small package which later analysis revealed contained 23.6 grams of 27 percent pure heroin hydrochloride. Upon receiving the sample, Maloney told Yehuda that he would return with it to Atlantic City and have it tested; he added that if everything worked out well, he would want to buy at



least one kilogram. Yehuda responded that the price would be about \$200,000 per kilogram and that he would have to check with his friend to make sure everything was all right.

At this point, Maloney and Yehuda proceeded to a pay phone in the sky walk connecting the station and the Hilton Hotel. Maloney asked Yehuda if the transaction could be consummated in Atlantic City because he not only felt safer there but could also guarantee everyone else's safety. Yehuda replied that he would check this with "his man." Upon reaching the phone, Yehuda, referring to a piece of paper, punched in a series of numbers and hung up the phone. In response to Maloney's question as to whether the line was busy, Yehuda said that he had to call a beeper number and that his call would be returned. Maloney read from Yehuda's paper one of the numbers, 401-4532, that Yehuda had used. Several minutes later Yehuda received an incoming call on the pay phone. The call lasted several minutes and was carried out in a foreign language.

After this second call, Yehuda said that it was agreed that the transaction would be done in Atlantic City, but that his friend wanted to do it one pound at a time. Yehuda explained that "his friend" wanted Yehuda to deliver one pound to Maloney, receive \$110,000, then go back to get the second pound and deliver it to Maloney in return for the remainder of the purchase price (\$90,000). In response to Maloney's concern about completing the transaction anywhere but Atlantic City, Yehuda said that since Maloney was the buyer, "they" would complete it wherever he wanted.

The government subsequently obtained records from a Novotel Hotel in New York City which showed that a phone call had been made to the pay phone in the Newark skywalk at 1:44 pm on February 25, 1987 from a room registered to Annette Amar, an alias used by Yaffa Levy.

At 6:55 pm the next day, Levy, Gozlon-Peretz and Yehuda arrived together at the Sands Hotel; Levy rented room 1002 using an Israeli passport in the name of Annette Amar. The hotel desk clerk testified that she saw a full red bag among the defendants' luggage. At 7:05 pm Yehuda and Maloney met at an arranged spot in the Golden Nugget Hotel lobby; Yehuda was carrying a large red bag. After proceeding to Maloney's hotel room in the Golden Nugget, Yehuda stated that he had come to Atlantic City with "his friend" and asked Maloney if he had a balance that he could borrow as his had been too bulky to bring. Maloney lent Yehuda his electronic scale, and Yehuda put it into his red bag. Yehuda stated he was going to leave the scale with "his friend" while he, Yehuda, brought the first installment of drugs to Maloney. Yehuda was to have returned the scale with the second installment, at which point Maloney would have used the scale to weigh the total delivery. They then returned to the lobby and Maloney asked Yehuda if he wanted to call his friend prior to meeting him. Yehuda declined to call, stating that "his friend" was "there" and he would go "right to there." Appendix at 56.

Yehuda was followed by a detective Imfeld of the Atlantic City Police Department from the Golden Nugget Hotel to the Sands Hotel. Yehuda hired a taxi and took a very circuitous route back to the Sands Hotel, which included retracing his steps and making a "U" turn.

Yehuda also repeatedly looked out the back window during the ride. When he arrived at the Sands Hotel he walked in circles and looked around the lobby for fifteen minutes. Yehuda then went to the elevator bank and waited for an empty elevator. Once in the elevator, Yehuda kept it on the ground floor for a "good minute" and then pushed the fifth and tenth floor buttons. After the elevator went to the tenth floor it came straight down empty.

At 8:40 pm Yehuda, carrying the red bag still containing the scale, returned to the Golden Nugget. Yehuda told Maloney that "his friend" had told him that Yehuda must see or obtain at least half the money before proceeding further. Maloney replied that this was unsatisfactory and that they had already agreed on the structure of the exchange. Yehuda then said that "it was difficult, that he had no control over it, that he was - you know, he was caught in the middle." *Id.* at 57. Maloney told Yehuda that if he had to "front" the money, the sale was off, but he did ask Yehuda to call his friend and see if a compromise could be worked out. Yehuda went to a pay phone, asked Maloney to walk around, and then talked in a foreign language for less than five minutes. After the telephone conversation, Yehuda reported to Maloney that it might be possible for Yehuda to deliver 100 grams to Maloney, at which point Maloney would show Yehuda the money. Although Maloney agreed to this arrangement, Yehuda said that he had to await another phone call as he "hadn't spoken to the guy but had spoken to his girlfriend who was in the hotel room, that the man wasn't there and that she could only say that the guy would probably give [Maloney] a hundred grams." *Id.* at 58.

Yehuda received the return call at the pay phone shortly thereafter and talked for a couple of minutes in a foreign language. Upon completing the call, Yehuda reported to Maloney that "his friend" was adamant about seeing the money first and that if he did not the transaction would not be completed. Maloney rejected the new terms, made a counter offer, and asked Yehuda to call his friend again. Yehuda complied, using the same phone as before. Maloney reported that after Yehuda placed the call, he heard Yehuda ask for room 1002 in English. After this call, Yehuda reported that "his friend" would not agree to Maloney's suggestion. They then walked through the lobby arguing about the fact that Yehuda had agreed to complete the sale one way but was now changing the agreement. During this exchange, Yehuda said that he was as surprised as Maloney when the plans were changed and that "it was difficult being caught in the middle, that he was caught between two hard dealing people, that [Maloney] wouldn't bend and his friend wouldn't bend and that he hated doing business that way." *Id.* at 60.

At 10:55 pm Yehuda, carrying the red tote bag, rented room 1430 at the Sands Hotel using the name "Holly Berthold." At approximately 11:15 pm Maloney received a message on his beeper to call a certain number. The number was that of a pay phone in the lobby of the Sands Hotel; Yehuda answered it. Yehuda told Maloney that his "friend" had relented and that he was willing to do the transaction the way Maloney had suggested; the first installment, however, was to be only 250 grams. Maloney agreed to these terms and arranged to meet Yehuda a little later.



Maloney and Yehuda met around 11:45 pm. Yehuda gave Maloney a package containing 185 grams of heroin. Moments later agents moved in and arrested Yehuda.

During the subsequent search of rooms 1002 and 1430 and the associated follow-up investigation, additional evidence was discovered. Two calls were placed from room 1002 to the pay phone Yehuda had been using the evening of February 26, 1987; one had been placed at 8:59 pm and the other at 9:55 pm. The times coincided with Yehuda's telephone conversations in Maloney's presence. During a search of room 1002, the following items were found: 1) a beeper, on a shelf near the bed with the number 401-4532 inscribed on its back; 2) foreign passports in the names of Pasquale DiStefano and Annette Amar; 3) two consecutively numbered Greyhound bus tickets from New York to Resorts International; and 4) a bill from the New York Novotel Hotel. A third Greyhound bus ticket, with a number consecutive with the two seized in room 1002, was found on Yehuda's person.

A search was also conducted of room 1430 rented by Yehuda using a passport issued in the name of Derthon Holly.<sup>1</sup> During the search 2,127 grams of 24 percent heroin hydrochloride and a red tote bag were recovered.

When questioned after their arrest, Gozlon-Peretz and Levy identified themselves by the aliases Pasquale DiStefano and Annette Amar respectively.

<sup>1</sup> The hotel clerk apparently miscopied the name in Yehuda's false passport, misreading Holly Berthold for Derthon Holly.

### III.

#### A.

Federal Rule of Evidence 801(d)(2)(E) provides that out of court statements made by a "coconspirator of a party during the course and in furtherance of the conspiracy" are not hearsay. The requirements of the rule are met if the person against whom the statement is offered participated in a conspiracy, the statement was made in furtherance of the conspiracy, and the conspiracy was still in progress at the time the statement was made. *Ammar*, 714 F.2d at 245; *United States v. Gibbs*, 739 F.2d 838, 843 (3d Cir.1984) (en banc), cert. denied, 469 U.S. 1106, 105 S.Ct. 779, 83 L.Ed.2d 774 (1985). As we have noted, before *Bourjaily* this court required the prosecution to demonstrate these three facts by a "fair preponderance of the independent evidence." *Gibbs*, 739 F.2d at 843 (quoting *United States v. Trotter*, 529 F.2d 806, 811-813 (3d Cir.1976)); see *Ammar*, 714 F.2d at 247. Thus, an out of court statement offered as a statement of a co-conspirator was admissible only if evidence other than the statement itself made it more likely than not that the defendant participated in the alleged conspiracy and that the statement was made during and in furtherance of that conspiracy. See *Gibbs*, 739 F.2d at 843, (quoting *Trotter*, 529 F.2d at 812 n. 8). The trial judge in this case correctly identified this as the then governing standard.

Levy and Gozlon-Peretz assert that the independent evidence falls short of establishing by a preponderance of the evidence that they participated in a conspiracy with Yehuda. They do not dispute that if such a conspiracy were shown, the statements could be found to have

occurred in furtherance and in the course of that conspiracy. Thus, in reviewing the district court's decision to admit Yehuda's statements under *Ammar*, our inquiry is restricted to "whether, viewing the [other] evidence in the light most favorable to the government, the district court had 'reasonable grounds' for concluding that, more probably than not, [the defendants] were coconspirators." *United States v. Inadi*, 748 F.2d 812, 817 (3d Cir.), rev'd on other grounds, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986); see *United States v. Janotti*, 729 F.2d 213, 218 (3d Cir.1984), cert. denied, 469 U.S. 880, 105 S.Ct. 243, 244, 83 L.Ed.2d 182 (1984). We hold that the district court did have reasonable grounds for so concluding.

We start with the undisputed proposition that Yehuda went to Atlantic City in February of 1987 to offer for sale and deliver a substantial quantity of heroin. It is equally clear that Yehuda was accompanied on this trip by Levy and Gozlon-Peretz and that they occupied the same hotel room during most of the time the negotiations were ongoing. Accordingly, the issue for decision is whether there is independent evidence which, when added to Levy's and Gozlon-Peretz's association with Yehuda and their proximity to the transaction, permits an inference that they were involved in the selling of the heroin. We now turn to that evidence.

The independent evidence established that Yehuda repeatedly interrupted the negotiations to use the telephone and that he repeatedly changed his position immediately following such use. Two explanatory hypotheses have been advanced by the parties in connection with this evidence. Levy and Gozlon-Peretz suggest that Yehuda was negotiating solely on his own account and

was using the apparent telephone calls as a ruse to put himself in a better bargaining position. The government, on the other hand, urges that Yehuda was acting as a broker whose role was to bring Maloney together with a party who had a large quantity of heroin to sell. Based on the independent evidence, we conclude that the district court could properly infer that Yehuda was not dealing on his own account and that the calls involved conversations with co-conspirators. Moreover, having drawn this inference, we believe the district court had ample reason to further conclude that Levy and Gozlon-Peretz were the co-conspirators whom Yehuda contacted by telephone.

First, with respect to Yehuda's role in the transaction, we find it significant that during the eleven months leading up to the February sale, Maloney had been attempting unsuccessfully to purchase heroin from Yehuda. Despite many promises to provide Maloney with samples, Yehuda had never been able to produce any heroin. In fact, one of the sticking points between Maloney and Yehuda in their negotiations was Maloney's refusal to finance Yehuda's excursions abroad to obtain heroin and arrange for suppliers. If Yehuda had had the ability to supply heroin on his own account, it would seem likely that he would have fulfilled his promises and delivered heroin to Maloney during their many dealings in 1986. His failure to do so is supportive of the inference that he was not dealing on his own account in February of 1987.

In addition, the nature of the sticking points in the February 25th and 26th negotiations were not over price or purity, as one would expect if Yehuda were the supplier trying to use clever bargaining strategy to increase his profits; rather Yehuda and Maloney haggled over who



should perform first. Yehuda wanted Maloney to pay before he delivered the drugs, and Maloney wanted the transaction done in two steps, with half of the drugs being exchanged for half the money at each stage. These disagreements are more characteristic of a broker taking instructions from a cautious supplier who did not know or trust the buyer, than of a supplier trying to drive a hard bargain with a known purchaser.

Finally, the district court was entitled to credit Maloney's evaluation that Yehuda was genuinely frustrated by finding himself "caught in the middle" and unable to consummate the transactions as planned. That frustration is supportive of the inference that Yehuda was not dealing solely on his own account and that the telephone calls were conversations with his co-conspirators.

Second, with respect to the identity of Yehuda's co-conspirators, we find the inference for which the government contends compelling. The first call made by Yehuda in Newark was placed to a beeper later found in the Sands hotel room engaged by Levy and occupied by Levy and Gozlon-Peretz. That call was returned from the New York Novotel Hotel room also occupied by them. Likewise, in Atlantic City, Yehuda made at least one call to room 1002 and two of his other calls were returned from that room.

Moreover, there are three other indications that Levy and Gozlon-Peretz were the ones in league with Yehuda. It can be inferred that the 'counter surveillance' techniques used by Yehuda on his way to the Sands Hotel from his 7:05 pm meeting with Maloney were an attempt

to protect the people and drugs in room 1002 from detection. In addition, the absence of other contacts between Yehuda and third parties, as revealed by police surveillance, tends to exclude the likelihood of an unknown third party being the supplier. Finally, the 'guilty consciousness' demonstrated by Levy and Gozlon-Peretz in giving false names upon arrest also tends to indicate that they were not just innocent bystanders vacationing in Atlantic City.

For these reasons, we conclude that there was sufficient independent evidence to make it more likely than not that Levy and Gozlon-Peretz were participants with Yehuda in a conspiracy to distribute heroin. We find that independent evidence every bit as probative of a conspiracy as the independent evidence in *Gibbs*, 739 F.2d 838, and in *United States v. Leon*, 739 F.2d 885 (3d Cir.1984). Contrary to appellants' contention, we also find our conclusion entirely consistent with *United States v. Wexler*, 838 F.2d 88 (3d Cir.1988), in which the court concluded that a defendant who aided in the transportation of a truck containing illegal drugs did not have reason to know that the truck contained anything other than stolen goods. First, in this case, unlike *Wexler*, there is evidence from which one can rationally infer that the defendants were the suppliers of the drugs. Second, in *Wexler* the government had to show enough evidence to support a conviction, a far heavier burden than it labors under here.

#### B.

Levy insists that the district court erred in admitting evidence of her possession of a passport issued in the

name of Annette Amar and of her use of that fictitious name. Making reference to the "international traveling statutes," she characterizes this evidence as "other crimes evidence" and asserts that, even if it has some relevance, its probative value is outweighed by its potential for undue prejudice. Gozlon-Peretz makes a similar argument. We are unpersuaded.

The use of false passports and identities by the defendants is relevant for at least three reasons. First, defendant Levy's use of her "Annette Amar" alias in checking into the two hotel rooms, supports the government's contention that she was the "front person" for Gozlon-Peretz and Yehuda, protecting their identities while they completed the heroin sale. If the sale had been consummated as planned, the only direct link to Gozlon-Peretz would have been the fading memory of the Sands Hotel desk clerk. Thus, the use of the false identity could be seen as part of the defendants' plan in implementing the conspiracy, a safety measure to protect Gozlon-Peretz in case the buyer was later arrested. Second, the defendants' attempt to conceal their true identities by providing aliases to the police upon arrest is relevant as consciousness of guilt. *United States v. Kalish*, 690 F.2d 1144, 1155 (5th Cir. 1982), cert. denied, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958; see also *United States v. Boyle*, 675 F.2d 430 (1st Cir.1982); *Leon*, 739 F.2d at 893 n. 19. Finally, the use of false identities by all three conspirators also tended to show joint planning and coordination by the defendants in an attempt to protect themselves from future investigation and pursuit.<sup>2</sup>

<sup>2</sup> Yehuda used several false names during his dealings with Maloney. At the times Yehuda called Maloney he usually  
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Federal Rule of Evidence 404(b) was not violated because the challenged evidence thus tended to show preparation, plan, and state of mind. Similarly, we conclude that Rule 403 was not breached because this evidence had significant probative value and very little, if any, potential for undue prejudice. Evidence of illegal entry into the United States is not likely " 'to suggest a decision on an improper basis, [for instance] an emotional one.' " *Weinstein's Evidence*, ¶ 403[03] (quoting the Advisory Committee's Note to Rule 403). Nor is it likely to arouse the jury's sense of horror, provoke its instinct to punish, or lead the jury to base its decision on something other than the established facts in the case. *Id.* at ¶ 403[03]. The trial judge clearly did not abuse his discretion in admitting this evidence.

### C.

In evaluating Levy's and Gozlon-Peretz's argument that all the above facts, considered together, do not show that they had the requisite knowledge and intent to convict them of the crimes charged, we must decide "whether, viewing the evidence most favorably to the government, there is substantial evidence to support the verdict." *Wexler*, 838 F.2d at 90. We find that the record contains the requisite support.

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identified himself as "George," when he checked into hotels in New Jersey he told Maloney to ask for "Mr. Sabag," and when he arrived in New Jersey in February of 1987 he used the name of Berthold Holly to rent room 1430 at the Sands Hotel.



In Levy's case, she used a false name both to rent the hotel rooms, which were used as 'command posts,' and to mislead the police after she was arrested. She traveled to Atlantic City with Gozlon-Peretz and Yehuda, Gozlon-Peretz stayed with her in both rooms, Yehuda called the rooms she had rented during the course of the negotiations, and Gozlon-Peretz used those rooms to return Yehuda's calls. Moreover, it might also be inferred that the drugs were kept in the room she had rented at the Sands Hotel for most of the negotiating period on February 26, 1987.<sup>3</sup> And most importantly, Levy received a phone call from Yehuda, proposed a compromise to keep the transaction alive, and passed the proposed compromise on to Gozlon-Peretz.

This evidence supports the jury's conclusion that Levy not only had knowledge of the conspiracy but also played a significant role in bringing it to fruition.

The evidence supporting Gozlon-Peretz's conviction is stronger than that supporting Levy's. Not only did he travel to Atlantic City with Levy and Yehuda, aid in engaging room 1002, occupy the "command posts" with Levy and give a false name to the police, but the jury was also entitled to infer from Yehuda's many co-conspirator

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<sup>3</sup> The drugs had to be somewhere when Yehuda met with Agent Maloney at 7:05 pm. The most probable place would be in the room that his likely suppliers had rented, especially given the permissible inference that he went to room 1002 after telling Maloney that he was going to leave the scale with "his friend" so that the friend could measure out the drugs before delivery. Yehuda only rented room 1430, where the rest of the drugs were found, at 10:55 pm.

statements that Gozlon-Peretz was the supplier of heroin who used Yehuda to dictate the terms of the sale.

#### D.

We now turn to the question of whether error was committed in the sentencing of Gozlon-Peretz and Yehuda. Gozlon-Peretz was sentenced on Count Three to twenty years in prison, a Special Parole Term of five years, a "stand committed" fine of \$200,000 and a \$50 Special Assessment. The court also imposed concurrent twenty year terms on Counts One and Two, a Special Parole Term under Count Two, and additional Special Assessments.

On Count Three, Yehuda was sentenced to twenty years in jail, a Special Parole Term of five years, a "stand committed" fine of \$200,000, and a Special Assessment of \$50.

After sentence was imposed, the Assistant U.S. Attorney sought to clarify the import of Gozlon-Peretz's sentence under the new drug sentencing laws and engaged in the following exchange with the sentencing judge:

Is it my understanding that Count 3, being the more severe count, that the defendant is also sentenced to a mandatory minimum term of ten years in prison, which he must serve without probation or parole; and that on Count 2 that there is a minimum of five years, which he must serve without probation or parole; is that correct, Judge?

Appendix at 291. To which the judge replied, "[t]hat's correct. That's correct." *Id.*

The prosecutor's statement of the parole consequences of the sentence imposed was not correct. The relevant sentencing provisions, as revised in October 1986,<sup>4</sup> state that "[n]o person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein." 21 U.S.C. § 841(b)(1)(A)(i), (b)(1)(B)(i). Thus, with respect to at least two of his twenty year sentences,<sup>5</sup> Gozlon-Peretz is not entitled to be considered for parole at any time.

<sup>4</sup> The provisions of the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, §§ 1002 & 1003, amending the relevant aspects of 21 U.S.C. § 841(b)(1) became effective immediately upon the signature of the President on October 27, 1986. *U.S. v. Meyers*, 847 F.2d 1408 (9th Cir.1988); U.S. Dept. of Justice, *Handbook on the Anti-Drug Abuse Act of 1986*, at ix (Crim.Div.1987).

<sup>5</sup> It is doubtful whether Gozlon-Peretz's twenty year sentence on Count One, which alleges a conspiracy to distribute heroin in violation of 21 U.S.C. § 846, implicates the provisions of the Anti-Drug Abuse Act of 1986 prohibiting parole. See, *Handbook on the Anti-Drug Abuse Act of 1986*, at 17-20; *United States v. Jureidini*, 846 F.2d 964 (4th Cir.1988). We need not decide this issue, however, because where the sentences imposed on two of three counts are vacated and all three sentences arise from the same criminal transaction, it is appropriate to vacate the third, valid sentence, see, *United States v. Rosen*, 764 F.2d 753 (11th Cir. 1985), *cert. denied*, 474 U.S. 1061, 106 S.Ct. 806, 88 L.Ed.2d 781 (1986), in order to afford the trial judge an opportunity to properly exercise his sentencing discretion, *United States v. Grayson*, 795 F.2d 278, 287 (3d Cir. 1986), *cert. denied*, 481 U.S. 1018, 107 S.Ct. 1899, 95 L.Ed.2d 505 (1987) and to "reduce the possibility of disparate and irrational sentencing." *United States v. Busic*, 639 F.2d 940, 948 (3d Cir.), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981); cf. *United States v. Hawthorne*, 806 F.2d 493, 499-501 & n. 14 (3d Cir.1986).

Based upon the exchange between the prosecutor and the court, there is an unacceptable risk that at least two of Gozlon-Peretz's current sentences are the result of a misconception concerning their legal effect. Accordingly, under *United States v. Katzin*, 824 F.2d 234, 240 (3d Cir.1987) ("sentencing on the basis of materially untrue assumptions violates due process") (citing *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972)); *United States v. Kerley*, 838 F.2d 932, 941 (7th Cir.1988) (remand for resentencing required when sentence may have been based on legal and factual misunderstandings), Gozlon-Peretz is entitled to have his sentences on Counts Two and Three vacated.<sup>6</sup> We will vacate Gozlon-Peretz's sentences and will remand for resentencing.

Yehuda's sentence, imposed on the same day as Gozlon-Peretz's, was similarly flawed.<sup>7</sup> We will also vacate Yehuda's sentence and remand for resentencing.

<sup>6</sup> In view of our decision on this issue we need not reach appellant Gozlon-Peretz's claim of ineffective assistance of counsel during the sentencing phase.

<sup>7</sup> The following colloquy occurred with respect to Yehuda:

THE COURT: . . . It is adjudged on Count 3 that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for a term of 20 years plus five years special parole, and is fined two hundred thousand dollars. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due process of law. Special assessment of 50 dollars is imposed.

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In addition, Yehuda also challenges the "stand committed" fine of \$200,000 imposed on him by the district court judge in the absence of any factual findings regarding his ability to pay that fine. The judge ordered that the "defendant . . . stand committed until the fine is paid or he is otherwise discharged by due process of law." We confess to some uncertainty as to what the judge intended by this language. Given that the judge apparently believed Yehuda was destined to spend a minimum of ten years in prison without regard to whether the fine was paid, the reference to a discharge by due process of law may reflect an anticipation on his part that Yehuda

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Asst. U.S. Atty.: Yes Judge. But first one additional inquiry. Am I given to understand that the court also has imposed a *ten year mandatory minimum*, which the statute requires in this instance?

THE COURT: I have on my presentence investigation report the penalty as five years special parole.

Asst. U.S. Atty.: Judge, with the amount that he pleaded [sic] guilty to it was – *no, I'm talking about the mandatory minimum of the incarceration*. There is a five years [sic] mandatory special parole, but the offense to which the defendant pleaded guilty carries a ten year mandatory minimum.

THE COURT: The ten year mandatory minimum takes care of that.

Asst. U.S. Atty.: Does it?

THE COURT: Correct, its a statutory minimum. [sic]

Appendix to Yehuda's Brief at 46-47 (emphasis added).

could raise any "ability to pay" issue in a subsequent proceeding if a failure to pay the fine ever became the sole reason for his incarceration.

Because of our disposition of the other sentencing issue, we find it unnecessary to decide whether the district judge's failure to make a finding regarding Yehuda's ability to pay was reversible error in this context. When the district court holds a resentencing hearing for Yehuda following remand, it will have before it a defendant who was determined at the commencement of this appeal to be unable to pay court costs. With indigency having been so established, we think it likely that the district court either will decline to impose a "stand committed" fine or will accompany the imposition of such a fine with an explanation of its purpose. Clearly, that would be the preferable practice in these circumstances.<sup>8</sup>

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<sup>8</sup> There is general agreement that a district court has authority to impose a "committed fine," that is a fine which will result in incarceration until payment is made. *See, e.g., Hill v. U.S. ex rel. Wampler*, 298 U.S. 460, 56 S.Ct. 760, 80 L.Ed. 1283 (1936). The purpose of such a fine, however, is to assist enforcement of the order imposing it, *e.g., Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), a purpose that is not served by the imposition of a "committed fine" on an indigent defendant. The Court of Appeals for the Ninth Circuit, however, has held that, though an indigent defendant may not ordinarily be incarcerated for non-payment of a fine, this principle does not impair the validity of a judgment containing a committed fine if there is reason to believe that the defendant's ability to pay will be determined before the defendant is held solely on the basis of the non-payment of the fine. *United States v. Estrada de Castillo*, 549 F.2d 583 (9th Cir.1976);

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## IV.

Since the evidence challenged by Levy and Gozlon-Peretz was properly admitted and as there was sufficient evidence to support their convictions for the crimes charged, we will affirm their convictions. We will vacate Yehuda's and Gozlon-Peretz's sentences and remand for resentencing.<sup>9</sup> Levy's sentence will be affirmed.

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*United States v. Miller*, 588 F.2d 1256 (9th Cir. 1978). The argument in favor of this position sanctioning reliance on a subsequent determination of the defendant's ability to pay becomes stronger where, as here, there is a lengthy term of imprisonment in addition to the fine. Nevertheless, the likelihood of a material increase in assets during incarceration normally will not be substantial and, if there is any reason at the time of sentencing to question whether the defendant is financially responsible, we think it at least prudent for the sentencing judge to address the ability-to-pay issue before imposing a committed fine. If the court's decision is in favor of imposing such a fine, its supporting findings will be of assistance in the event the fine ultimately becomes the only basis for detaining the defendant. If the court decides against a committed fine because of the defendant's financial position or for any other reason, the possibility of a commitment to incarceration remains open, of course, if it can later be shown that the defendant has failed to pay despite an ability to do so. See *Tate v. Short*, 401 U.S. 395, 400, 91 S.Ct. 668, 671, 28 L.Ed.2d 130 (1971).

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<sup>9</sup> Given our decision to remand for resentencing, we need not reach Yehuda's Eighth Amendment argument.

United States Court of Appeals,  
Third Circuit.

UNITED STATES of America

v.

Moshe GOZLON-PERETZ, Appellant.

No. 89-5330.

Submitted Under Third Circuit Rule 12(6)  
Oct. 16, 1989.

Decided Jan. 25, 1990.

As Amended Feb. 6, 1990.

Before BECKER, COWEN and SEITZ, Circuit Judges.

# OPINION OF THE COURT

BECKER, Circuit Judge.

This appeal by Moshe Gozlon-Peretz challenges the imposition of a five-year term of special parole, as part of a sentence for a drug conviction, on the ground that in February 1987, when the offense was committed, it was not punishable by a special parole term. During the 1970's and 1980's, special parole became a staple of the penalty scheme prescribed by Congress for drug offenses. However, in amending 21 U.S.C. § 841(b) pursuant to the enactment of the Comprehensive Crime Control Act of 1984, Congress failed to provide for special parole in § 841(b)(1)(A), which defines the high volume drug crime for which appellant was convicted and sentenced.

Appellant acknowledges that in the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570 Tit. I (1986) ("the ADAA"),

which amended the 1984 Act. Congress created an alternative to special parole – the so-called term of supervised release. However, appellant contends that Congress intended supervised release to be complementary to the Sentencing Reform Act's new guidelines sentencing regime, which did not become effective until November 1, 1987. Because the offense in question occurred in February 1987, appellant submits that he is not subject to a term of supervised release either.

The government responds that Congress intended the 1986 legislation, which was enacted on October 27, 1986 and had no effective date provisions, to become effective immediately. Such a reading, the government maintains, requires the imposition of special parole, not supervised release, in this case. We do not agree with the government's contention that an immediate effective date would resuscitate the moribund special parole sentencing option, but we do believe that Congress intended the supervised release provisions to become effective immediately. Accordingly, we will vacate the judgment of sentence, and remand to the district court with directions to vacate the sentence of special parole and to impose a term of supervised release.<sup>1</sup>

<sup>1</sup> The appellant's only other claim – that the district court's imposition of a special assessment of \$50.00 on each count was invalid because 18 U.S.C. § 3013 was enacted in contravention of the origination clause, U.S. Const. art. I, § 7, cl. 1 – has been foreclosed by our opinion in *United States v. Simpson*, 885 F.2d 36 (3d Cir.1989).

## I.

## A.

The background facts are set forth in our opinion in *United States v. Levy*, 865 F.2d 551 (3d Cir.1989) (in banc). There, we vacated Gozlon-Peretz's sentence and remanded for resentencing. On remand, the district court imposed large fines and lengthy prison terms followed by a five-year special parole term, pursuant to 21 U.S.C. § 841(b)(1)(A).

Before 1984, certain sentences imposed under the applicable sentencing provision in this case, 21 U.S.C. § 841(b), were required to include a special parole term. See 21 U.S.C. § 841(b) (1982). On October 12, 1984, Congress enacted the Comprehensive Crime Control Act, Pub.L. No. 98-473, 98 Stat. 1837, 1976 (1984) ("the Act"), which amended existing federal drug law.<sup>2</sup> Among these amendments, the Act created three levels of offenses based upon the weight of the drugs in question. Specifically, Congress amended § 841(b) by:

- (1) eliminating special parole for offenses committed after the effective date of the Act (originally November 1, 1986, and later changed to November 1, 1987);
- (2) redesignating old §§ 841(b)(1)(A) and (B) as new §§ 841(b)(1)(B) and (C), respectively; and
- (3) creating a new class of sentences under "new" § 841(b)(1)(A), which provided for higher sentences for greater weights of drugs.

<sup>2</sup> The Sentencing Reform Act was one chapter of the Comprehensive Crime Control Act. See 98 Stat. 1976, 1987.



98 Stat. at 2030, 2068. See also *United States v. De Los Reyes*, 842 F.2d 755, 757 (5th Cir.1988). Apparently through oversight, new § 841(b)(1)(A) did not mention a special parole term. Acknowledging that oversight, neither party here contends that special parole or supervised release can be imposed for crimes committed between October 12, 1984 and October 27, 1986, the date of the ADAA's enactment. See *United States v. Phungphiphadhana*, 640 F.Supp. 88 (D.Nev.1986); *United States v. Mowery*, 703 F.Supp. 940 (M.D.Ga.1989). Appellant maintains, however, that special parole cannot be imposed on any § 841(b)(1)(A) offense committed between October 12, 1984, and November 1, 1987, the effective date of the Sentencing Reform Act.

In § 1002 of the ADAA, Pub.L. No. 99-570, 100 Stat. 3207-2 to 3207-4 (1986), Congress again amended § 841(b) by:

- (1) striking the existing §§ 841(b)(1)(A) and (B);
- (2) reattaching and redesignating § 841(b)(1)(C) as § 841(b)(1)(D);
- (3) adding three new subsections: new §§ 841(b)(1)(A), (B), and (C);
- (4) attaching mandatory "supervised release" to new §§ 841(b)(1)(A), (B), and (C).

The amendments thus prescribed four offense levels instead of three, based upon the weight of the drugs. These enhanced prison terms and fines and the attendant terms of "supervised release" were made applicable to the first three parts of § 841(b), including § 841(b)(1)(A), the section under which appellant was sentenced. Section

1002 did not carry an express provision for its effective date.

In contrast, section 1004 of the ADAA, Pub.L. No. 99-570, 100 Stat. 3207 3207-6 (1986), which deleted all remaining references to special parole terms and substituted for them the term "supervised release," specifically provided that it was to take effect at the same time as 18 U.S.C. § 3583, which was part of the Sentencing Reform Act, 18 U.S.C. § 3551 *et seq.* (Supp. IV 1986). Because of a legislative postponement, that Act, originally scheduled to go into effect on November 1, 1986, did not go into effect until November 1, 1987. See Pub.L. No. 99-217, § 4, 99 Stat. 1728 (1985).

#### B.

We find that under § 1002 of the ADAA, appellant is subject to a mandatory minimum five-year term of supervised release in addition to his term of imprisonment. That is the result reached on essentially identical facts in *United States v. Torres*, 880 F.2d 113 (9th Cir.1989), which held that the regime of supervised release under § 841(b)(1)(A) came into being on October 27, 1986, the date of enactment of the ADAA. A number of other cases hold that § 1002 did not go into effect (and supervised release for drug cases did not come into being) until November 1, 1987. See *United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir.1988); *United States v. Smith*, 840 F.2d 886, 889 (11th Cir.1988); *United States v. Byrd*, 837 F.2d 179, 181 (5th Cir.1988). These cases are arguably explained by the fact that they all involved lower volume drug offense provisions, for which special parole was not abolished



until November 1, 1987. See § 1004(b) of the ADAA, 100 Stat. at 3207-6. In each of these cases, the courts vacated terms of supervised release and directed that the district court impose terms of special parole instead, thus treating supervised release and special parole as somewhat interchangeable concepts. That course of action cannot be followed here because no special parole term is available for violations of § 841(b)(1)(A) occurring after October 12, 1984.

We do not dispute that special parole and supervised release are closely related mechanisms for post-release supervision of federal offenders.<sup>3</sup> However, the substitution of supervised release for special parole of federal offenders was not accidental:

The legislative history of the [Sentencing Reform Act of 1984] shows that Congress was dissatisfied with the "old" law which conditioned the length of time a defendant was supervised on parole solely on the length of the original term; the smaller percentage of the term a prisoner served in prison, the longer the period of parole supervision. Congress decided to replace this system with one that would make both the existence and the length of post-incarceration supervision dependent on the judge's decision as to whether community supervision was needed in an individual case. The Senate

<sup>3</sup> The bill originated in the Reagan Administration, not the Congress. As sent by the President to the Congress, see "The Drug Free America Act of 1986: A Proposal to Congress From the President of the United States," the bill spoke of special parole. See Proposal § 502(1)(A)(VII). It was Congress that invented "supervised release."

Report in the section-by-section analysis explained this approach:

Unlike current law, however, probation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it.

Slawsky, Looking at the Law, 53 Federal Probation 69, 70 (June 1989) (quoting S.Rep. No. 225, 98th Cong., 2d Sess 125, reprinted in 1984 U.S.Code Cong & Admin.News 3182, 3308). Thus, Congress had more than formal reasons for supplanting (special) parole with supervised release, and to the extent that the *Whitehead*, *Smith*, and *Byrd* courts found the two mechanisms to be substantively the same, we disagree with their holdings.

We hold that supervised release became effective on October 27, 1986. We acknowledge that supervised release was conceptually linked to the regime of the Sentencing Reform Act, which did not become effective until November 1, 1987, but we do not believe that supervised release terms are inseparable from the Sentencing Reform Act's regime. Two basic principles of statutory construction compel our holding. First, absent indication to the contrary, a statute takes effect on the date of its enactment. See *Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 65 (3d Cir.1989); 2 Sutherland's Statutory Construction § 33.06 (4th ed. 1986). Second, courts must impute a reasonable purpose to Congress, and it is unreasonable to think that Congress wanted to maintain special parole for all offenses committed up until November 1, 1987. A number of considerations support this view, as reasoned by Ms. Slawsky, Assistant General Counsel of the Administrative Office of the United States Courts:

[G]iven the relatively long periods of incarceration required by these sections, by the time most of these defendants returned to the community, the supervised release provisions of the Sentencing Reform Act would be in effect, and . . . by the time some of the defendants served their long mandatory minimum terms of imprisonment, the Parole Commission would no longer be in operation to supervise special parole terms.

Slawsky, *supra*, at 86. Thus, supervised release will de facto replace special parole for offenses committed after November 1, 1987. Furthermore, supervised release will be administered by the federal probation service whereas special parole is administered by the United States Parole Commission, which will expire by operation of law in 1992. See section 235 of the Sentencing Reform Act, 98 Stat. at 2031-32, (stating that chapter 311 of Title 18 of the United States Code, 18 U.S.C. § 4201 *et seq.*, remains in effect until five years after the effective date of the Act). Although a successor agency will doubtless be created, its anatomy and powers are unknown.

Additionally, to the extent that Congress did inadvertently leave special parole out of the 1984 Act and intended to correct its error with respect to high volume drug offenses in the ADAA, it is not reasonable to believe that Congress intended to correct a previous error by making the correction effective two years hence. Thus, we hold that supervised release came into effect with the enactment of the ADAA, on October 27, 1986.<sup>4</sup>

<sup>4</sup> We do not find the explicit invocation of the later effective date (November 1, 1987) for "the amendments made by

(Continued on following page)

We recognize that this holding perpetuates a circuit split. We join the Ninth Circuit in holding that supervised release became effective when the ADAA, became effective. Although the Fourth, Fifth and Eleventh Circuits were not faced with situations where the defendant would be unsupervised (the defendants in those cases were charged with distributing smaller quantities of drugs so that special parole applied, *see supra*, at 1404), the district courts in those circuits are bound by the *Whitehead*, *Smith*, and *Byrd* decisions "across the board."

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(Continued from previous page)

this section" in § 1004(b) of the ADAA, 100 Stat. at 3207-6, to be inconsistent with our holding. The "section" referred to in § 1004 means only § 1004 itself, not the entire ADAA, and the amendments referred to, contained in § 1004(a), strike out the term "special parole" and insert the term "supervised release." These amendments were necessary because, although § 1002 of the ADAA inserted supervised release for some offenses which had previously been special parole offenses (21 U.S.C. § 841(b)(1)(A), (B) & (C)), it did not insert supervised release for all special parole offenses. For instance, special parole was retained for 21 U.S.C. §§ 841(b)(1)(D), 845, 845a, 845b, and 960(b)(4). Thus, § 1004(b) was necessary to effectuate the change from special parole to supervised release for all those offenses for which the ADAA had not already implemented supervised release.

We also note in this regard that the government's argument that special parole, not supervised release, is the appropriate post-release supervision mechanism to fill the void created by the legislative confusion, is undetermined by the fact that Congress, in passing the ADAA, perpetuated special parole for some offenses, but not for others. It appears that Congress knew which offenses it wanted special parole to apply to in the interim period, and 21 U.S.C. § 841(b)(1)(A) was not one of them.



At first reading this point may seem technical, but its practical consequences are enormous because responsibility for supervising post-release offenders will be divided, for no logical reason, between the probation service, for people sentenced to supervised release, and the U.S. Parole Commission or its successor, for people sentenced to special parole.<sup>5</sup> The problem is compounded by the fact that supervision by the judiciary is frequently transferred from one district to another, *see* 18 U.S.C. § 3605, and the transferee district may be in a different circuit with a different rule as to whether special parole or supervised release is the proper sentence. The anatomy of the problem that may arise in the event that such a sentence is challenged in a proceeding under 28 U.S.C. § 2241 is described in the margin.<sup>6</sup> For these reasons the

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<sup>5</sup> We note that a special parole term may require more community supervision because, upon revocation of a special parole, an individual may be re-paroled. By comparison, after revocation of a supervised release term, there is no provision for additional post-release supervision.

<sup>6</sup> Assume a transferor district on a regime of supervised release and a transferee district on a regime of special parole. While many courts may find that the sentence as imposed is the sentence that controls, this situation will at the very least lead to increased litigation. In this situation, if the Court attempts to revoke supervised release, the defendant can claim that the Parole Commission has jurisdiction and that the Commission's reparole guidelines should apply. A defendant in such a situation could also claim that he is entitled to early termination of parole pursuant to 18 U.S.C. § 4211(c), a provision that has no parallel for supervised release. Such scenarios serve to underscore that, given the clear split in the circuits, similarly situated releasees will often be treated differently.

Supreme Court might wish to consider resolving the circuit conflict.

The judgment of sentence will be vacated and the case remanded with directions to impose a term of supervised release in lieu of a term of special parole. In all other respects, the judgment of sentence will be affirmed.

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 89-5330

UNITED STATES OF AMERICA

vs.

MOSHE GOZLON-PERETZ,  
*Appellant*

(D.C. Crim. No. 87-00080-03)

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT  
FOR THE \_\_\_\_ DISTRICT OF NEW JERSEY

Present: BECKER, COWEN and SEITZ, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the \_\_\_\_ District of New Jersey and was submitted under Third Circuit Rule 12(6) October 16, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 14, 1989, be, and the same is hereby vacated insofar as the judgment of sentence and the cause remanded to the said District court with direction to impose a term of supervised release in lieu of a term of special parole. It is further ordered and adjudged that the judgment of sentence is affirmed in all other

respects. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Minos  
Clerk

January 25, 1990

No. 89-5330

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Certified as a true copy and issued in lieu of a formal mandate on February 16, 1990.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals,  
for the Third Circuit

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SUPREME COURT OF THE UNITED STATES

No. 89-7370

Moshe Gozlon-Peretz,  
Petitioner

v.

United States

June 18, 1990

ON PETITION FOR WRIT OF CERTIORARI TO THE United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted limited to the following question:

Whether the mandatory minimum terms of supervised release required by the Anti-Drug Abuse Act of 1986 became effective for offenses committed on or after the date of enactment, October 27, 1986.

Filed August 6, 1990

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NO. 89-5330

UNITED STATES OF AMERICA

v.

MOSHE GOZLON-PERETZ,  
*Appellant*

On Appeal From the United States District Court For the District of New Jersey

(D.C. Crim. No. 87-00080-03)

Submitted Under Third Circuit Rule 12(6)  
October 16, 1989

Before: BECKER, COWEN and SEITZ,  
*Circuit Judges.*

**ORDER AMENDING OPINION**

The opinion in the above-captioned case, filed January 25, 1990, is amended as follows:

On page 8, line 15, delete "supra at 86" and insert "Looking at the Law 52 Federal Probation 86, 86 (June 1988)". Because the Supreme Court has granted certiorari in this case, No. 89-7370, the Clerk is directed to certify a copy of the amendment to the slip opinion to the Clerk of the United States Supreme Court.

BY THE COURT:

/s/ Edward R. Becker  
Circuit Judge

DATED: August 6, 1990